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In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. _____.

MORRIS WEXLER AND ANNABELLE WEXLER,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals For the Sixth Circuit.

Counsel for Petitioners prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on February 25, 1957.

OPINIONS BELOW.

The opinion of the United States Tax Court is reported at T. C. memo 122. The opinion of the United States Court of Appeals for the Sixth Circuit was entered on February 25, 1957. Copies of both opinions appear in the appendix attached hereto, pp. 5-17.

JURISDICTION.

The judgment of the Court of Appeals for the Sixth Circuit was made and entered on February 25, 1957 and a copy thereof is appended to this petition in the appendix at page 17. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED.

The question presented is:

Does the imposition by the Tax Court of a more stringent burden of proof on a person arbitrarily and vaguely classified on the "fringe of society" amount to a deprivation of property without due process of law?

CONSTITUTIONAL PROVISION INVOLVED.

The constitutional provision which is relevant to the decision of this case is Amendment V, United States Constitution, which reads as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT.

This petition seeks to review a judgment of the United States Court of Appeals for the Sixth Circuit which affirmed judgment rendered by the Tax Court. The Respondent made a determination that the Petitioners had $58,255.00 of gambling income in the year 1949 (5a). The Tax Court found that the Petitioners had $40,150.00 of such income (5a).

The Tax Court held that the Petitioner was a person "on the fringe of society" and that therefore a more

stringent burden of proof should be imposed upon him than is imposed on other taxpayers (12a).

The United States Court of Appeals for the Sixth Circuit in affirming the decision of the Tax Court did not comment upon the imposition of the added burden of proof although counsel had presented the question and argued it in his brief.

REASONS FOR GRANTING THE WRIT.

The Tax Court found that the Petitioner was a person "on the fringe of society" and the Court went on to say that such persons must get every possible scrap of their financial records and make a far greater effort than other taxpayers to substantiate the correctness of his tax return (12a). This arbitrary classification resulted in the imposition of an added burden of proof. The singling out of one taxpayer and imposing upon him a more stringent burden of proof than is imposed upon other taxpayers is a denial of due process of law as guaranteed by the Fifth Amendment to the United States Constitution. Fair and equal treatment is fundamental to due process. When one person is singled out for different treatment before the bar, that person is being deprived of his constitutional rights.

The instant case is novel and unique. The Tax Court has in effect made an arbitrary classification and applied different principles of law to the "fringe of society" than to the rest of society. An important question of civil liberties is the result. The Appellate Court dismissed this question without comment thereby compounding the error of the Tax Court.

Petitioners strongly urge that this Court hear this matter. Petitioners contend that the protection of one individual's civil liberties is a matter of importance to the

general public. There can be no doubt that the public is affected when one citizen is denied due process for such a denial goes to the very heart of our constitutional guarantees of civil liberties.

Moreover, the dismissal without comment by the Appellate Court of the constitutional question raised by the action of the Tax Court has left the question undecided. Does a Court have the power to classify a person as being "on the fringe of society" and impose upon that person a more stringent burden of proof. It is respectfully submitted that this question is one of such importance to merit the attention of this honorable Court.

Respectfully submitted,

SAMUEL BARKER,

Counsel for the Petitioners.

EDWARD GINSBERG,

Of Counsel.

APPENDIX.

OPINION OF THE TAX COURT.

(Filed May 16, 1955.)

1. In 1949, petitioner placed bets of several hundred thousand dollars with a bookmaker for himself and for one Luke Smith. The bookmaker's daily betting sheets showed all such bets as being made by petitioner and indicated net winnings of $58,105. Winnings in petitioner's name included winnings of $10,635 on lay-off bets which the bookmaker had placed through him. On some days during the year, Smith made bets directly with the bookmaker and, except in unusual circumstances, would not place bets through petitioner on those days. Winnings from bets placed in petitioner's name on such days were $43,815. The bookmaker settled bettors' credit accounts by cash payments or by switching accounts between bettors. *Held,* petitioner received $40,150 of additional gambling income in 1949 which was fully taxable to him in that year.

2. In 1950, an experienced accountant kept petitioner's books. Petitioner owned and operated a racing stable and bought and sold horses. He did not keep records on the purchase price of horses but gave such information personally to the accountant from memory. A part of the uncontested deficiency for 1950 resulted from the respondent's disallowance of the alleged cost of a horse in computing the gain realized on its sale. *Held,* respondent correctly imposed a penalty under section 293(a) of the Internal Revenue Code of 1939 for petitioner's negligence in not keeping accurate records of the cost of horses purchased.

MEMORANDUM FINDINGS OF FACT AND OPINION.

This proceeding involves the following deficiencies in income tax and penalties determined by the respondent:

Year	Deficiency	Sec. 293(a) Penalty	Sec. 294(d) Penalty
1949	$42,715.52	$2,206.26	$1,436.23
1950	10,760.66	538.03	2,150.00
	$53,476.18	$2,744.29	$3,586.23

The issues to be decided are: (1) whether petitioner, Morris Wexler, received gambling income in 1949 which he failed to report; and (2) whether the respondent correctly determined a penalty under section 293(a) for the year 1950. Petitioner no longer protests the imposition of penalties under sections 293(a) and 294(d) for the year 1949, if we uphold the respondent's determination of a deficiency for that year, based on the receipt of unreported gambling income. By amended petition, petitioner alleged that the respondent was barred from asserting a deficiency and penalties for the year 1949 because section 3631 of the Internal Revenue Code of 1939 had been violated. He did not, however, discuss that issue on brief and we, therefore, deem it to have been abandoned.

Some of the facts were stipulated.

FINDINGS OF FACT.

The stipulated facts are so found and are incorporated herein by this reference.

Morris Wexler (hereinafter referred to as petitioner) and his wife, Annabel Wexler, were residents of Cleveland, Ohio, and filed their joint returns for the years in issue with the collector of internal revenue for the eighteenth district of Ohio.

Petitioner owned and operated a race wire service for the benefit of bookmakers and a racing stable during the years in question.

In 1949, petitioner placed bets of several hundred thousand dollars with a bookmaker by the name of William J. Griffiths (hereinafter referred to as Griffiths) of Barberton, Ohio. A part of the bets placed by petitioner were his own and a part were bets which he placed with Griffiths for one Luke Smith (hereinafter referred to as Smith), a so-called betting commissioner of Rochester, New York. When a bet was placed with Griffiths, it was recorded on a daily betting sheet. Such sheets showed the name of the person making the bet, the name of the horse, the amount of the bet, and the amount, if any, won. Griffiths also indicated on such sheets similar information with respect to so-called lay-off bets; i.e., bets which he had received and did not wish to keep and which he passed on to others. During 1949, Griffiths placed a number of lay-off bets through petitioner. Griffiths' betting sheets show net winnings of $10,635 on such lay-off bets which he carried in petitioner's name.

The next day, after the bets were placed and the results of the races known, Griffiths recorded on cards the net winnings and losses of the various persons who had made bets with him. It was not until then that the total bets which petitioner had made the previous day were separated between bets which he had made personally and those which he had made for Smith. Bets on more than three horses in the same race, and on two horses in the same race—one of which was owned by petitioner—are shown in his name on Griffiths' betting sheets for certain days during the year.

Griffiths settled his accounts with various bettors by cash payments, or by certified checks made out to fictitious

payees, or by so-called switches; e.g., if Griffiths owed Smith and Smith owed petitioner and petitioner owed Griffiths, Griffiths would switch the credit balance of Smith's account to petitioner's account. When a bettor's account was settled, his card was destroyed and a new card made up for him for subsequent bets or "action" with Griffiths.

During 1949, Smith placed bets with Griffiths directly and also through petitioner. Smith used petitioner as a conduit for dealing with Griffiths because of difficulties which he and Griffiths sometimes experienced in dealing directly. For the year 1949, Griffiths' daily betting sheets showed total wins for petitioner of $386,945, total losses of $328,840, and net wins of $58,105. Such sheets show that Smith in that year had total wins of $110,115, total losses of $84,025, and net wins of $26,090. Griffiths' betting sheets on the days when both petitioner and Smith placed bets showed total wins for petitioner of $386,945, total losses of $193,340, and net wins of $43,815.

Petitioner maintained no records of either his personal betting activity or his betting activity in behalf of others.

At the time of respondent's investigation, Griffiths had destroyed the card files on individual bettors for 1949, but the respondent determined that net wins of $58,105 reflected on Griffiths' daily betting sheets were petitioner's net winnings for the year, which constituted additional taxable income to him. He also determined that petitioner won a $150 baseball bet in 1951.

Among the adjustments in petitioner's income tax for 1950, respondent disallowed the alleged cost of a horse which petitioner sold in that year in computing the gain on such sale. Petitioner's books were kept by an experienced accountant during the year but the information as to the cost of horses which petitioner purchased was

given by him to the accountant from memory. No vouchers or bills of sale for the horses, which petitioners purchased, were given to or seen by the accountant.

Petitioner realized additional gambling income in the year 1949 of not less than $40,150. The deficiency in petitioner's tax for 1950 was due to negligence.

OPINION.

RICE, *Judge*: Petitioner's principal argument against the respondent's determination that he received gambling income in 1949 is that he received no such income and that the respondent's determination is arbitrary because the records on which that determination was based are not conclusive evidence showing that he did, in fact, receive any gambling income. He thus attempts to shift the burden of proof to the respondent, by arguing that the respondent must show that he did, in fact, receive additional income from gambling and the exact amount thereof.

The record does not support the petitioner's position. Insofar as records are concerned, it was petitioner who was negligent in not maintaining records of his betting activity. Griffiths' daily betting sheets, which were the basis of respondent's determination, are, in fact, the most basic evidence of petitioner's betting activity. Admittedly, those sheets are not conclusive proof that the amounts indicated thereon were, in fact, the actual amount of petitioner's winnings for the year. Griffiths' file cards of individual bettors had been destroyed and it was those cards which apparently would have shown the breakdown between the bets which were petitioner's and those which had been made by him for Smith. The absence of those cards, however, does not vitiate the respondent's determination nor shift to him the burden of showing the exact amount of petitioner's winnings. Petitioner admitted that he made

personal bets with Griffths and we think on this record that it is wholly unreasonable to assume, as he would have us do, that his losses always equaled or exceeded his winnings. Smith testified that only in unusual circumstances would he have placed bets through petitioner on those days when he was placing them directly with Griffiths. Smith admitted, however, that even when he was placing bets with Griffiths directly, he also placed bets through petitioner when he was unable to reach Griffiths on the phone. That he placed bets personally with Griffiths and also with Griffiths through petitioner seems very probable in the months of June and July 1949, when there was extensive betting activity on both his and petitioner's part. Smith, it is to be remembered, was a betting commissioner and it was to his advantage to place as many bets as possible. Petitioner's net winnings on the days when both he and Smith were placing bets were $43,815. Petitioner admitted, also, that on days when Smith placed no bets with Griffiths that he, himself, in addition to making bets for Smith, was making personal bets. It is, of course, possible that, as the respondent determined, petitioner realized net winnings from his own personal bets on many of those days.

Petitioner testified that he never received any money from Griffiths in 1949, and that he, therefore, could not have received any gambling income in that year. Griffiths, on the other hand, admitted sending $15,000 to petitioner in either 1948 or 1949, but could not remember specifically in which year. The evidence is inadequate and, such as there is, too conflicting to make a finding as to the manner in which petitioner's net winnings with Griffiths were settled. The respondent devoted a considerable portion of his argument on brief to a discussion of the doctrine of constructive receipt. From the evidence before us, we think there is no question but that petitioner's winnings,

even though not received by him in cash, constituted taxable income to him in 1949. Regulations 111, Section 29.42-2.[1]

As further proof that all of the bets recorded in his name on Griffiths' betting sheets were not his, petitioner argues that on certain days those sheets show bets in his name on three or more horses in the same race or on two or more horses, one of which he owned. He argues that no one would bet against himself or bet more than three horses in one race. Smith's testimony, to some extent, corroborated petitioner's argument, as did Griffiths'. Both Smith and Griffiths were experienced gamblers on horse races. Smith testified in answer to the question: "Now, would it be logical, if you know, for a man to bet five or six horses in the same race on his own account?" "Well, he would have to get his head examined. I would say that fellow, there is something wrong with that fellow. There is nobody can bet five or six horses on a race and figure to wind up with a winner, that is, for a sure thing."

We think the respondent's argument is unrealistic in assuming that winnings, on those days when petitioner placed bets on many horses or on horses running in the

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[1] REGULATIONS 111.

Sec. 29.42-2. Income Not Reduced to Possession.—Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession. To constitute receipt in such a case the income must be credited or set apart to the taxpayer without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made, and must be made available to him so that it may be drawn at any time, and its receipt brought within his own control and disposition. A book entry, if made, should indicate an absolute transfer from one account to another. If a corporation contingently credits its employees with bonus stock, but the stock is not available to such employees until some future date, the mere crediting on the books of the corporation does not constitute receipt.

same race with one owned by him, were exclusively from his personal bets.

Insofar as the $10,635 which respondent determined that petitioner won from lay-off bets placed through him by Griffiths, there is testimony in the record that petitioner was not a bookmaker and thus did not take such bets himself. Griffiths testified that when he called petitioner to ask him to accept a lay-off bet, he would always wait for a return call from petitioner definitely confirming that the bet had been accepted. This, petitioner argues, is conclusive proof that he was passing Griffiths' lay-off bets on to some third party. We are satisfied that the evidence with respect to such lay-off bets establishes that petitioner was not a bookmaker and that such bets were placed by Griffiths through him as a conduit and were, in turn, accepted by some third party.

Our difficulty, however, in reaching a precise determination of petitioner's actual winnings is no one's fault but his own. *Cohan v. Commissioner*, 39 F. 2d 540 (C. A. 2, 1930). His testimony at the hearing was vague and unconvincing. He admitted that he was not available for questioning by a Congressional committee investigating organized crime until a warrant for his arrest had been issued, whereupon he voluntarily appeared at a hearing of the committee in Washington, D. C. At such hearing he declined to answer most questions asked him on the grounds of self-incrimination for fear of prosecution of his operation of a wire service and income tax violations. As we have said before, one whose income is derived from operations or activities on what might be called the "fringe of society" should make a far greater effort than other taxpayers to keep every record and every scrap of evidence of his financial transactions to substantiate the correctness of his return to the satisfaction of the Federal tax

administrators. The petitioner here did not do that and we are satisfied that the record before us fully justifies our finding that petitioner received not less than $40,000 of additional gambling income from bets placed for himself with Griffiths.

Petitioner's only evidence that he did not win a $150 baseball bet in 1949 was his testimony that he seldom made baseball bets and could not remember having won such sum. This is obviously insufficient to overturn the respondent's determination.

We do not understand that petitioner disputes the respondent's determination of penalties under sections 293 (a) and 294 (d) if a deficiency is found for 1949. Petitioner conceded his liability for the deficiency which the respondent determined for 1950 and for the penalty determined under section 294 (d) for that year. He protests the imposition of the negligence penalty for 1950, however, on the ground that he employed an experienced accountant to keep his books and relied exclusively on him to keep those books accurately and to collect the information from which his returns were prepared. Petitioner's accountant was called as a witness and, for the most part, his testimony substantiates petitioner's argument. However, information with respect to the cost of horses which petitioner purchased was given to the accountant by petitioner who had no vouchers or bills of sale. The disallowance of the cost of one of the horses which petitioner sold in 1950 was a part of the respondent's adjustment in determining the deficiencies for that year. We think petitioner was negligent in not keeping accurate records on the purchase price of horses which he bought, since he operated a racing stable as a regular business. The respondent's determination of the penalty is, therefore, upheld.

Decision will be entered under Rule 50.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided February 25, 1957.)

Before ALLEN, McALLISTER and STEWART, Circuit Judges.

ALLEN, Circuit Judge. This is a petition to review determinations of deficiency for taxable years 1949 and 1950, for which petitioner and his wife filed joint returns. The Commissioner determined a deficiency of $53,476.18 against petitioner, who owned and operated a race wire service and a racing stable and also placed extensive individual bets on horse races. The Tax Court reduced the Commissioner's determination to not less than $40,150 for 1949. Penalties determined under Sections 293 (a) and 294 (d), Internal Revenue Code of 1939, for the year 1949 are not questioned if the determination of deficiency for that year is sustained. Also the Tax Court upheld a penalty against petitioner for negligence under Section 293 (a) because of his not keeping accurate records of the cost of horses purchased in 1950. The Tax Court, as shown by its findings and opinion, gave the case thorough consideration. It deducted $10,635 won from layoff bets placed through petitioner by Griffiths, and reduced the deficiency for 1949 by $2,565.

Petitioner's main contentions are that the findings of the Tax Court are against the weight of the evidence, that petitioner has sustained his burden of proving the Commissioner's determination wrong, and that *Helvering v. Taylor*, 293 U. S. 507, requires reversal.

The principal evidence introduced was a series of betting sheets from the bookmaker W. J. Griffiths of Barberton, Ohio, with whom petitioner placed several hundred thousand dollars of bets during 1949 for petitioner and Luke Smith, a betting commissioner of Rochester, N. Y.

The betting sheets, which were entered daily, showed for 1949 total wins for petitioner of $386,845, total losses of $328,840, and net wins of $58,105.

The case turns essentially on questions of fact upon which the Tax Court made detailed findings which are supported by the record. In order to sustain petitioner's claim that he had no additional unreported income for 1949 from gambling winnings, we must ignore petitioner's long-established betting activity: the written record of the betting sheets which were checked for accuracy by the Government against the racing manual and found to be correct; the evidence of payments of amounts won, either by cash, by certified check to fictitious persons, or by switching of credits; and winnings of $43,815 shown on the betting sheets for days on which both petitioner and Luke Smith placed bets. Petitioner urges that many of the bets upon which winnings were allocated to him were bets made by him with Griffiths for Smith. Petitioner testified that he had no gambling winnings in 1949. However, he admitted that he made personal bets on his own and other horses. Smith, a fairly candid witness, testified that he would not as a rule have placed bets through petitioner on those days when Smith was making bets directly with Griffiths. Since the amount of $43,815 was totaled from the days when both petitioner and Smith were placing bets with Griffiths, substantial evidence supports the Tax Court's finding that up to $40,150 constituted winnings to petitioner. Detailed records of his personal winnings were kept by petitioner during this period but he destroyed them all prior to the investigation. Thus the fact that the Tax Court cannot determine the deficiency in exact dollars and cents is due to petitioner's own failure to keep books as required by the statute. Petitioner was not inexperienced in these matters. His

racing stable was a large concern. He had some 20 named horses on which he bet, as well as others. All accounts of the stable were kept by an expert accountant.

Section 54 (a) of the Internal Revenue Code of 1939 and Treasury Regulations 111, Section 29.54-1 required petitioner to keep permanent records sufficient to enable the Commissioner to determine the correct amount of income subject to the tax. Under 26 U. S. C., Section 41, since petitioner's records were destroyed, the Commissioner was authorized to compute the amount in such a way as in his opinion clearly reflected petitioner's income. The burden of proving that the deficiency determination was wrong rested on petitioner. *Interstate Transit Lines v. Commissioner of Internal Revenue,* 319 U. S. 590, 594; *Mathews Rubino v. Commissioner of Internal Revenue,* 226 Fed. (2d) 291, 295 (C. A. 6). The Tax Court was authorized to modify the findings and decision of the Commissioner, *Blair v. Oesterlein Machine Company,* 275 U. S. 220, and its findings are conclusive if supported by the record. *Rubino v. Commissioner of Internal Revenue, supra.* The findings of the Tax Court that petitioner had realized additional gambling income in 1949 of not less than $40,150 is sustained by ample evidence and is conclusive here.

Petitioner's failure to keep records on the purchase price of horses for his racing stable clearly constituted negligence and authorized a penalty for 1950 under Section 293 (a).

Taylor v. Commissioner of Internal Revenue, 70 Fed. (2d) 619 (C. A. 2), affirmed 293 U. S. 507, does not affect this holding. That case decided that, while the original assessment of the Commissioner is presumptively correct, this presumption does not extend to other findings which the Commissioner has never made. The doctrine

does not cover findings specifically made by the Tax Court and based upon substantial record evidence which, as repeatedly held, are binding on this court. Here petitioner's own evidence, taken with that of the Commissioner, was "sufficient also to establish the correct amount that lawfully might be charged against him." *Helvering v. Taylor, supra*, 515.

The decision of the Tax Court is affirmed.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed February 25, 1957.)

On Petition to Review a decision of the Tax Court of the United States.

This cause came on to be heard on the transcript of record from the Tax Court of the United States, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this court that the decision of the said Tax Court in this cause be and the same is hereby affirmed.